

SCOTT HARSHBARGER  
ATTORNEY GENERAL

(617) 727-2200

*The Commonwealth of Massachusetts*  
*Office of the Attorney General*  
*One Ashburton Place*

*Boston, MA 02108-1698*  
DOCKET FILE COPY ORIGINAL

OCT 30 1997

October 29, 1997

BY EXPRESS MAIL

Mr. William Kennard  
Chairman Designate  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

**Proposed Rule Making: Preemption of State and Local Zoning  
and Land Use Restrictions on the Siting, Placement and  
Construction of Broadcast Transmission Facilities,  
FCC 97-296; MM Docket No. 97-182.**

Dear Mr. Kennard:

On August 19, 1997, the Federal Communications Commission ("FCC") issued a public notice ("the Notice") requesting comments on the joint petition of the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners"). The proposed rules would preempt state and local zoning and land use restrictions on the siting, placement and construction of Broadcast transmission facilities. 62 FR 46241 (Tuesday, September 2, 1997). By these comments, the Attorney General of the Commonwealth of Massachusetts ("Massachusetts Attorney General") addresses the petition and sets forth the basis for the position of the Commonwealth that the petition should be denied.

The Commonwealth of Massachusetts believes that the petition

RECEIVED  
OCT 30 1997

075

William Kennard  
October 29, 1997  
Page 2

sweeps too broadly. Not only does it discuss wide-ranging prohibitions that would prevent citizens from asserting their interest in maintaining their quality of life, but the measures under consideration would exceed the authority that Congress has delegated to the Commission.

1. Legal Limits on Preemption.

As the Notice recognizes, "It is incumbent upon the Commission not to 'unduly interfere with the legitimate affairs of local governments including certain health, safety and aesthetic regulations, when they do not frustrate federal objectives.'" 62 FR at 46242 (citation omitted). The Commission must confine its preemptive powers within the limits necessitated by the respective roles of the States and the federal communications agency. See Public Service Commission of Maryland v. F.C.C., 909 F.2d 1510, 1516 (D.C. Cir. 1990) ("We doubt, however, that the FCC may preempt state regulation--in light of Section 2(b)--simply on the grounds that it is economically irrational or even that it imposes too great an economic burden on carriers engaged in both interstate and intrastate communications.") (dictum), citing Louisiana Public Service Comm. v. FCC, 476 U.S. 355, 373-372 (1986). Federal Agencies' preemption rulings cannot be deemed reasonable unless they pass muster "in light of the strong presumption against federal preemption in matters traditionally regulated by the state." Commonwealth of Massachusetts v. United States Department of Transportation, 93 F.3d 890, 894 (D.C. Cir. 1996).

The Courts have recognized that "[a]n agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it." California State Board of Optometry v. Federal Trade Commission, 910 F.2d 976, 982 (D.C. Cir. 1990). See BFP v. Resolution Trust Corp., 511 U.S. 544, (1994) ("Federal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating must be reasonably

William Kennard  
October 29, 1997  
Page 3

explicit." ). Any other rule would provide inadequate protection to the vital role played by the States within our constitutional structure. See Gregory v. Ashcroft, 501 U.S. 452 (1991), quoting Tribe, American Constitutional Law, at p. 480.

Apart from issues of electromagnetic interference, the Notice (text at FNs 5, 6) bases the Commission's authority to entertain the proposed rules upon general principles of conflict preemption and delegation of statutory authority. For its alleged delegated authority, the Notice relies upon very generalized statements in the Commission's enabling legislation articulating an objective for speedy conversion to DTV. See Notice at FN 7. Similarly, footnote 2 of the Notice cites the Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 215 (1997) (codified at 47 U.S.C. 309(j)(14) (A)-(B), but that provision simply refers to return of broadcasters' analog spectrum by 2006, without suggesting preemption of local and state land use laws. The Notice also purports to rely upon the schedule in its Fifth Report and Order, but the Report and Order, standing alone, cannot provide the necessary delegation, which must come from Congress, not the Commission itself.

The very generalized statutes cited by the FCC are too slim a reed upon which to rest far-reaching preemption of state and local environmental, zoning and other land use rules unrelated to electromagnetic interference. Nothing in the cited statutes suggests--let alone clearly states--that Congress intended the Commission to venture as far into traditional state and local regulation as the petition proposes. This is particularly apparent when the cited statutes are contrasted with the explicit preemption provisions of other statutes, most notably the Telecommunications Act of 1996.

In contrast to the cited authority favoring preemption, the importance of state and local land use regulation is well grounded in controlling precedent. See e.g. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). More generally, "government cannot exist if the citizen may at will use his property to the detriment of his fellows or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest."

William Kennard  
October 29, 1997  
Page 4

Nebbia v. New York, 291 U.S. 502, 523 (1934). In these circumstances, even if the statutes cited in the Notice delegated preemptive authority over state and local zoning and land use laws to the Commission (which the Massachusetts Attorney General denies), the Commission's "reasonable accommodation of conflicting policies" test is not met. Notice, FN 10, citing City of New York v. FCC, 486 U.S. 57, 64 (1988).

The authority to preempt well-established police power regulations cannot lie in a general, broad purpose to make an admittedly desirable product (such as digital television) available in the face of laws based upon legitimate local aesthetic, environmental and land use concerns. "In the interest of avoiding unintended encroachment on the authority of the States", the Courts are "reluctant to find pre-emption." CSX Transportation, Inc. v. Easterwood, 507 U.S. 663-664 (1993). Preemption does not turn upon broad statements of policy goals, but, rather, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue." [citation omitted]. To say that anything that makes construction of digital TV easier furthers the goals of the Commission greatly overstates Congress' intent, particularly when the Commission has already recognized (as Congress, too, must have) the importance of state and local land use and aesthetic regulation. "[C]ourts should not strain to infer from vague statutory language or legislative committee rhetoric a goal of maximizing a particular public policy." City of New York v. United States Department of Transportation, 715 F.2d 732, 740 (2d Cir. 1983), app. dismissed and cert. denied, 465 U.S. 1055 (1984) and cases cited. As the Supreme Court has stated:

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice--and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (mandatory

William Kennard  
October 29, 1997  
Page 5

sentences for the purpose of imprisoning the offenders did not implicitly repeal the authority of sentencing judges to suspend sentences).

Nor do conflict preemption principles support the proposed rule. For instance, in Commonwealth Edison v. Montana, 453 U.S. 609, 633-634 (1981), the Supreme Court acknowledged that several federal statutes encouraged the use of coal, but did "not, however, accept appellants' implicit suggestion that these general statements demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal." Instead, the Court stated:

In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict.

Id. at 634. In similar contexts, the courts have rejected far-reaching, policy-based preemption analysis in favor of a more particularized review of actual statutory language. See Wood v. General Motors Corp., 865 F.2d 395, 409 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990) (auto safety regulation), quoting Chrysler Corp. v. Rhodes, 416 F.2d 319, 325 (1st Cir. 1969) ("While 'the purpose and scope' section of a federal standard may well be the starting point in defining 'aspect of performance,' the inquiry cannot end there. In our view, resort must be had to the specific requirements and categories of the standard . . . .").<sup>1</sup>

---

<sup>1</sup> To rule otherwise would permit preemption of an entire "field." But "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). A clear statement is necessary before preemption of the field of state law will be inferred. See Gregory v. Ashcroft, 501 U.S. 452 (1991); English v. General Electric Company, 496 U.S. 72, 86 (1990); Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503

William Kennard  
October 29, 1997  
Page 6

The communications cases reflect this general principle that one purpose of a federal statute does not, in itself, imply that Congress meant to authorize federal agencies to override state and local regulation serving legitimate other purposes. See Louisiana Public Service Co., supra; Cf. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 370 (1986) (national goal of a rapid and efficient phone services is to be achieved by a "dual regulatory system") (emphasis in original).

In short, under conflict preemption analysis, "federal policy" cannot preempt State law, without an actual conflict with statutory provisions shown by hard facts. See English v. General Electric Co., 496 U.S. 72, 89-90 (1990); Commonwealth Edison; Exxon Corp v. Governor of Maryland, 437 U.S. 117, 133 (1978) (upholding Maryland statute despite "a conflict between the statute and the central policy of the Sherman Act . . ."). These are among a number of Supreme Court cases holding that preemption will not be inferred "where the most that can be said is that the direction in which state law pushes someone's actions is in general tension with broad or abstract goals that may be attributed to various federal laws or programs." Tribe, American Constitutional Law, ¶ 6-26, p. 487 et seq. (2d ed. 1988) and cases cited.

As demonstrated in the next section of these comments, the proposed rule would permit preemption where no real conflict between federal and local goals exist. It is therefore not reasonable for the Commission to interpret its statute as delegating authority to preempt long-standing state and local laws regulating matters other than electromagnetic interference. See generally Commonwealth of Massachusetts, supra.

## 2. The Shortcomings of the Proposed Rule

The proposed rule contains a number of provisions that unnecessarily and, we believe, unlawfully impair the ability of states and localities to protect the interests of their citizens. The Commission should reject these provisions as a matter of policy and as a matter of law.

The notice reports that the "proposed rule would preempt all state and local regulations that impair the ability of licensed broadcasters [to] construct or modify their facilities unless the state or local authority can demonstrate that the regulation is related to health or safety objectives." This broad-ranging proposal is not necessary to serve any federal purpose. Unlike section 704 of the Telecommunications Act (47 U.S.C. § 332c), this proposal does not turn upon the inability of broadcasters to achieve their communication goal. Rather, it addresses any local and state rule that might be said merely to "impair" but not prevent construction of transmission facilities in a timely manner. The Commission must insist on a greater degree of conflict between federal and local law before brushing aside legitimate local land use concerns. Cf. FN 11 of the Notice, 47 CFR at 46242.

Moreover, the proposal displaces the usual burden upon the proponent of preemption to show actual and irreconcilable conflict between state and federal regulations, and purports to place it upon state or local officials in every case. If the broadcaster cannot demonstrate a serious conflict, there is no reason why local government should be forced to do so, at taxpayer expense. Since preemption issues are litigated in a court proceeding, the Massachusetts Attorney General also submits that the petition asks the Commission to dictate to the courts a burden of proof that is inconsistent with court rules and rulings, and exceeds the authority of an executive branch agency.

The proposed rule also eliminates entirely any ability of states and localities to protect citizens' interest in aesthetic concerns. This interest extends not only to quality of life issues, but has economic impacts as well, particularly in areas where tourism is a significant or increasing part of the economy.<sup>2</sup>

---

<sup>2</sup> According to the calendar year 1995 figures provided by the Massachusetts Office of Travel and Tourism, direct expenditures for tourism added \$9.6 billion to the Massachusetts economy and had an economic impact of \$15.7 billion. Fifty-one percent of U.S. travelers to Massachusetts visit historical places or museums or engage in outdoor activities. Ignoring aesthetic concerns in the placement of towers and their ancillary

William Kennard  
October 29, 1997  
Page 8

Historic district regulation, essential to preservation of our nation's heritage, may also be undermined if the proposed preemption regulations were adopted. The proposal may even be construed to preempt environmental and other land use laws, although such laws in fact are related to health and safety objectives. Experience under the Telecommunications Act and other federal laws amply demonstrates that respect for aesthetic, environmental and other concerns can coexist with communications facilities. To presume that broadcasters cannot ever act consistently with local aesthetic regulations defies common sense and experience. The Commission's question "whether it should preempt . . . local regulation intended for aesthetic purposes" (62 FR at 46242) should be answered in the negative, for localities are still "best situated to resolve local land use and related aesthetic questions." Notice, FN 11 at id. (citation omitted). In short, the far-reaching preemption proposed in the Notice greatly exceeds what might be viewed as necessary for communications purposes and therefore cannot be justified on legal or policy grounds.

As to matters of state and local procedure, the proposed rule would impose specific time limits upon action by state and local action upon requests for necessary approvals. The time limits are arbitrarily and needlessly short, and preempt reasonable state requirements that are only slightly longer--precisely in order to permit full and orderly participation by the citizens affected by these decisions. For instance, part 3 of this letter discusses the state statutory structure for such decisions in Massachusetts.

There is no federal interest in imposing the somewhat shorter timelines in the proposed rule, and the broadcasters' justification that review "can last several months" (62 FR 46241) rings hollow where their own proposal (which contemplates approximately 2 months delay) does not result in timing that materially affects their ability to construct the necessary facilities if they proceed diligently. Moreover, any rigorous assessment of the need for preemptive regulations of this type must include a realistic review

---

structures could easily diminish the experience of historical places or the outdoors.



William Kennard  
October 29, 1997  
Page 9

of other factors, unrelated to state and local laws, that may cause delay in achievement of the DTV scheduled milestones.

As the Commission knows, states and localities have non-discriminatory procedures that apply to the myriad requests for land use approvals in non-communications areas, as well as communications areas. These procedures reflect an accommodation of local government's needs and the interests of applicants for approvals, who, after all, are fully represented in the state and local political bodies that establish these time frames. There is no reason to suspect that these generally applicable procedures would be inadequate to protect the interests of broadcasters. Certainly, there is no federal interest in preempting rules, such as those in Massachusetts, upon which localities rely, and which do not add significantly to any delay. On the contrary, a slightly shorter time for decision, coupled with a provision mandating approval upon failure to act, would be a trap for municipal and state officials, acting in good faith upon the procedures to which they are accustomed. Such a scheme could work to the disadvantage of smaller or less sophisticated localities in an unfair and unnecessary manner. It would also probably result in litigation.

### 3. Comments on Massachusetts' Current Procedures

Under the Home Rule provisions of the Massachusetts constitution, cities and towns in Massachusetts are empowered to enact zoning laws and land use regulations to promote the general welfare. The zoning power is exercised in conformity to the provisions of the Zoning Act ( Mass. Gen. Laws Chapter 40A), while a wide variety of other local boards of commissions exercise these functions in conformity to other state laws, such as conservation commissions created under the provisions of Mass. Gen. Laws Chapter 40, Section 8C.

Chapter 40A, s. 5, requires that within 14 days of receipt thereof the city council of a city or board of selectmen of a town refer all petitions for zoning law amendments to the planning board for a report with recommendations. The planning board is then required to hold a public hearing on the proposed amendment within 65 days of receiving the petition from the council or board of selectmen. Id. Within 21 days of the public hearing the planning

William Kennard  
October 29, 1997  
Page 10

board is required to submit its report to the council or board of selectmen with recommendations on the substance of the proposed amendment. Id. After receipt of the planning board's report, or after the passage of 21 days from the date of the public hearing, the council in a city or the town meeting in a town are able to vote on the proposed amendment, having first complied with their respective notice and hearing requirements. Id.

Throughout this process the citizens of the community have had multiple opportunities to express their views and opinions concerning the proposed change. Municipal boards and officials, and the citizens of the community, are thus able to bring the process of local land use regulation an entirely local perspective on the wisdom and lawfulness of the proposed changes, and the effects that those changes will have on their community. Within the broad limits of state law, local governments in Massachusetts are charged with adopting and amending local land use laws and regulations as an exercise of their police powers in furtherance of the public health and safety. They are uniquely equipped to do so both by law and circumstance. For precisely this reason state law defers such matters to local government with constraints only as required to assure compliance with other state laws.

In the local administration of local zoning laws, local permit granting authorities are required to comply with provisions of the Zoning Act in processing petitions for special permits and variances. Hearings on petitions for special permits and variances are to be held within 65 days of filing, and the permit granting authority must render its decision within 90 days from the conclusion of the hearing. Mass. Gen. Laws c. 40A, s. 9. Failure of the special permit granting authority to take final action within 90 days (or extended period agreed to by the petitioner) "shall be deemed to be a grant of the special permit." Id. The statutory scheme is designed to afford both municipal agencies and the general public an opportunity to understand the relief sought, to study the impact and implications for the community, and an opportunity to be heard on the matter.

Zoning ordinances or by-laws may also define and regulate structures abandoned or not used for a period of two years or more. Mass. Gen. Laws c. 40A, s. 6. The obvious purpose of that

William Kennard  
October 29, 1997  
Page 11

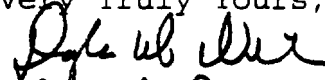
provision is to protect the public safety, as well as the public's interest in aesthetics, due to the unique hazards and blight of abandoned structures.

The regulation proposed by the FCC would frustrate the objectives of all of these statutes, which apply generally, not just to communications facilities.

Conclusion

For the above reasons, the Massachusetts Attorney General urges the FCC to deny the petition and not to initiate a rulemaking proceeding in this matter.

Very Truly Yours,

  
Robert Ritchie/su  
Kathryn Palmer

Douglas H. Wilkins  
Chief, Government Bureau

Robert Ritchie,  
Director, Municipal Law Unit

Kathryn Palmer,  
Municipal Law Coordinator

cc: Mr. William F. Caton (Six copies)  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554